In the Supreme Court of the United States.

OCTOBER TERM, 1899.

GILMER G. SCRANTON, PLAINTIFF in error, v. EBEN S. WHEELER. } No. 49.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR DEFENDANT.

STATEMENT.

The plaintiff, who is the plaintiff in error, brought an action in ejectment in the circuit court of the county of Chippewa, State of Michigan, to recover from the defendant possession of "an undivided one-half interest, or portion of, in and to private land claim number three, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land

beneath the water of St. Mary's River from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attached thereto and being a part thereof, which said premises the said plaintiff claims in fee."

For many years prior to 1850 the lands at Sault Ste. Marie, in part at least, were occupied by parties who had no legal title thereto, but claimed equitable rights by virtue of long-continued possession. The lands were lands of the United States, and repeated but unsuccessful attempts were made by these occupants to obtain recognition of their rights from Congress.

In 1850, however, Congress passed an act (9 Stats., p. 469, c. 71) which provided that the register and receiver of the land office at Sault Ste. Marie should be empowered and authorized to examine and report upon claims to lots at Sault Ste. Marie, according to the provisions of the act, and pursuant to instructions of the Commissioner of the General Land Office.

The second section of that act provides that—

> The said Commissioner shall cause the register and receiver to be furnished with a map, on a large scale, of the lines of the public surveys at the Sault Ste. Marie, and it shall be the duty of the Secretary of War to direct the proper military officer, on application of the register and receiver, to designate, or cause to be designated, upon the map aforesaid, the position and extent of lots necessary for military purposes, as also the position and extent of any other lot or lots which may be required for other public purposes, and also the position and extent of the Indian agency tract and of the Indian reserve.

Section 7 of the act provides that on the completion of certain preliminary maps and abstracts by the land officers the surveyor-general at Detroit shall dispatch a skillful deputy to the Sault Ste. Marie, and that—

> he shall proceed forthwith to lay off and survey the village of Sault Ste. Marie in town lots, streets, avenues, public squares, outlots, having regard to the lots and streets already actually surveyed, existing, or established, and having regard also to the existing limits and extent of lots covered by the claims which shall have been adjudicated by the register and receiver; and after such surveys shall have been completed the aforesaid deputy shall prepare a plat exhibiting, in connection with the lines of the public surveys, the exterior lines of the whole village, also the squares, individual lots, and the public lots, and also the outlots, designating the lots reserved for military and other purposes, according to the extent and limits of the same as fixed by the proper military officers pursuant to the requirements of the second section of this act, and specifying the name of each claimant of the individual lot and whether confirmed or rejected, the sum assessed by the register and receiver as a payment which should be made in each case by the party; * * * and it shall be the duty of the aforesaid deputy to return to the register and receiver their abstracts and map, and to submit to them his plat of the actual surveys, and if they shall be satisfied that it is in accordance with their adjudications they shall append a certificate to that effect, and the said deputy shall then transmit the said plat with the field notes to the surveyor-general at Detroit for examination of the work.

Thomas Whelpley was appointed deputy surveyor. He made the survey of private land claim No. 3 in 1854–55.

The plat and field notes were approved by the surveyor-general at Detroit, September 4, 1855. The claim was confirmed to Samuel Peck and the heirs of Franklin Newcomb in 1855, and patented to them October 6, 1874. From these plaintiff derives title, which is undisputed. By the field notes private claim No. 3 was described by metes and bounds, and one boundary was "along the right bank of the Ste. Marie River." The patent follows the description of the survey.

The St. Mary's River is a river or strait connecting the waters of Lakes Superior and Huron. It forms a part of the international boundary between the United States and the Dominion of Canada. It is a navigable stream. It and its connecting waters form a great and important highway for interstate and international commerce.

About 8 miles below where this river emerges from Lake Superior commence falls or rapids, which interfere with and obstruct navigation, continuing for three-fourths of a mile, in which distance the river falls 18 feet. By an act of Congress approved August 26, 1852 (10 Stat., 35, c. 92), there was granted to the State of Michigan the right to locate a canal through the military reservation at this locality, and 400 feet of land in width, extending along the line of said canal, was granted for its construction and convenience, to be located under the approval of the Secretary of War; and 750,000 acres of public lands were granted to the State to aid in constructing and completing said canal. The site selected was approved in 1853 by Jefferson Davis, then Secretary of War. The canal was begun in 1853 and com-

pleted as originally constructed in 1855, and was built entirely within the reservation. Piers were extended into the water from the west end of the canal, curving northward, the south pier being in front of that portion of land claim No. 3 now in controversy, but leaving a riparian frontage of about 300 feet open to deep water.

The United States has, from the institution of this work, recognized its national character, Congress having frequently made large appropriations for its construction, repair, preservation, and completion.

Act of July 11, 1870, 16 Stat., 224, c. 240;
Act of February 2, 1871, 16 Stat., 402, c. 34;
Act of June 23, 1874, 18 Stat., 238, c. 457;
Act of March 3, 1875, 18 Stat., 456, c. 134;
Act of August 14, 1876, 19 Stat., 136, c. 267;
Act of June 18, 1878, 20 Stat., 156, c. 264;
Act of March 3, 1879, 20 Stat., 369, c. 181;
Act of June 14, 1880, 21 Stat., 189, c. 211.

And the Secretary of War was authorized to accept, on behalf of the United States, from the State of Michigan the St. Marys Canal and the public works thereon.

Act of March 3, 1881, 21 Stat., 479, c. 136.

By the act of August 14, 1876, Congress appropriated the sum of $130,000, "to be expended under the direction of the Secretary of War." The plan of the work was adopted in the spring of 1877 by the United States engineers and the Secretary of War. The construction of the new south pier, the pier in question, was commenced in 1877 and completed in 1881. By the act of June 14, 1880 (above cited), the Secretary of War was authorized to accept, on behalf of the United States from

the State of Michigan, the St. Mary's Canal and the public works thereon. In 1881 the State transferred the canal to the United States (Howell's Stat., sec. 5502).

None of the fast land embraced within the limits of private land claim No. 3, as defined by the Whelpley survey, has been taken or occupied. The canal was built through the reservation, and if it infringes upon plaintiff's rights it is because the pier crosses more of his riparian frontage than did the pier which was there at the time of the confirmation of his title in 1855.

The defendant has no personal interest in the controversy, and is in possession of the pier in question simply as an employee of the United States, being the superintendent in charge of the canal.

Upon these facts the court directed a verdict for the defendant. The supreme court of Michigan affirmed the judgment entered upon that verdict. A writ of error has been taken to this court.

ARGUMENT.

I.

The supreme court of Michigan held that the United States Government took possession of the submerged land of the plaintiff for the purpose of erecting thereon piers in aid of the immense navigation upon the Great Lakes and the rivers connecting them, and that the improvements made were necessary to aid and protect this navigation. That this title to submerged lands along navigable waters and the right of access thereto are subject to the paramount right of the United States to use the land

in such manner as they shall determine to be necessary in aid of navigation, and this without compensation to the adjoining owner. This was and is the defendant's contention.

In Michigan the title to the submerged land is in the adjoining owner to the thread of the stream. But this ownership is limited by such rights as belong to the public at large to the navigation and such other use as appertains to the public over the water. (*Lorman* v. *Benson*, 8 Mich., 18; *Rice* v. *Ruddiman*, 10 id., 125; *Ryan* v. *Brown*, 18 id., 196.)

The United States has asserted no title to the soil of St. Marys River. When the revolution took place the people of each State themselves became sovereign, and in that character held the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the General Government. (*Martin* v. *Waddell*, 16 Pet., 367.) This doctrine applies in this country to all waters, navigable in fact, whether affected by the tides or not. And it is equally applicable to new States, which have the same rights, sovereignty, and jurisdiction over this subject as the original States. (*Pollard* v. *Hagan*, 3 How., 212; *Withers* v. *Buckley*, 20 How., 84; *Shiveley* v. *Bowlby*, 152, U. S. 1.)

In *Barney* v. *Keokuk* (94 U. S., 324, 338), Mr. Justice Bradley, speaking for the court, said:

> The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the

British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence it laid the foundation, in many States, of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin* v. *Waddell* (16 Pet., 367), *Pollard* v. *Hogan* (*supra*), and *Goodtitle* v. *Kibbe* (9 How., 471). These cases related to tide water, it is true, but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of the *Genesee Chief* v. *Fitzhugh* (12 How., 443), has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tides, are in the strictest sense entitled to the denomination of navigable waters and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limit of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated.

In the case of *Illinois Central Railroad* v. *Illinois* (146 U. S., 387, 435) the court said:

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several States belong to the respective States within which they are found, with the consequent right to use or dispose of any portion when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the permanent right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. * * *
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> When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the Crown of lands within the realm under tide water is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the Crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide.

And in the same case, in a dissenting opinion, it was said by Mr. Justice Shiras, speaking for the minority:

> The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the State to part with its control over them, is not dissented from (p. 474).

And in that case the court clearly designated the character of this title and control by the State over these waters. The court said, page 452:

> It is a title different in character from that which the State holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the States. But that is a very different doctrine from the one which would sanction the abdication of the general control

> of the State over lands under the navigable waters of an entire harbor or bay or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public and which can only be discharged by the management and control of property in which the public has an interest can not be relinquished by a transfer of the property.

It is clearly established, then, that the proprietorship of the beds and shores of navigable waters in this country, and their control of those waters belong to the States in trust for the use of the people, especially the public use of navigation and commerce. We are treating this question now without reference to the constitutional provision of the power of Congress to regulate commerce. The States can relinquish this ownership by grants of parcels of these lands, by legislative action, to individuals. They may "resign to riparian proprietors rights which properly belong to them in their sovereign capacity." But in whatever form they part with any of the title, and whether by express grant or by statute or judicial determination they extend the ownership of lands upon streams to the shores and beds, even to the middle of the stream, this public right of use remains. The State can not free the lands from the trust for the public uses of navigation and fishery. That trust is permanent and subsists upon all submerged lands, whether the *title* is in the State or the individual. It matters not how the citizen derived title, by legislative grant or as an incident to riparian ownership. The public right can not be destroyed or diminished.

It follows, then, that the States, by virtue of their sovereignty, can exercise certain powers over navigable waters in aid of navigation. This, of course, upon the hypothesis that Congress has not legislated upon these matters. Among them are the improvement of navigable channels; the regulation of wharves, piers, and docks; the construction of dams and bridges across the navigable waters of a State; quarantine and inspection laws, and the policing of harbors.

In *Pollard* v. *Hagan* (3 How., 320) the court said:

> The right of eminent domain over the shores and the soil under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions; and they, and they only, have the constitutional power to exercise it.

Gilman v. *Philadelphia* (3 Wall.) was a case where an injunction was sought to prevent parties from building a bridge provided for by an act of the legislature of Pennsylvania, upon the ground, among others, that it would be an obstruction to the navigation of the river, and, as such, repugnant to the Constitution and laws of the United States, touching the subject of commerce. The court said:

> It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters. * * *
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> It is for the municipal power to weigh the considerations which belong to the subject and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have

always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation.

The States may exercise concurrent or independent power in all cases but three:

1. Where the power is lodged exclusively in the Federal Constitution.

2. Where it is given to the United States and prohibited to the States.

3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.

In *Pound* v. *Turck* (95 U. S., 459) the power of the States, in the absence of Congressional legislation, to build dams all the way across navigable rivers was affirmed. The court, citing and approving *Wilson* v. *Blackbird Creek Co.* (2 Pet., 245), *Gilman* v. *Philadelphia* (*supra*), and *Crandall* v. *Nevada* (6 Wall., 35), said:

> The present case falls directly within the principle established by these cases, and aptly illustrates its wisdom. There are, within the State of Wisconsin, and perhaps other States, many small streams navigable for a short distance from their mouths in one of the great rivers of the country by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature

> of the State may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter.

Mobile County v. *Kimball* (102 U. S., 691) was a case where the validity of an act of the legislature of Alabama "To provide for the improvement of the river, bay, and harbor of Mobile" was called in question, on the ground that it conflicted with the commercial power vested in Congress. The court sustained the act. To quote a portion of its language:

> Inaction of Congress upon subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done respecting them, but is rather to be deemed a declaration that for the time being, and until it seems fit to act, they may be regulated by State authority.
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> The improvement of harbors, bays, and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove

obstructions from their harbors and rivers, deepen their channels and improve them generally if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the General Government.

In *Escanaba Transportation Co.* v. *Chicago* (107 U. S., 678), which was a bill in equity filed to enjoin the city from obstructing the free navigation of the Chicago River, as it is alleged to have done by certain regulations as to the opening and closing of the bridges over the same, the court said:

> The Chicago River and its branches must therefore be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. * * * When its (the State's) power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and the Federal Government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it as the supreme law of the land. But until Congress acts on the subject the power of the States

over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period and approved in repeated cases.

In *Huse* v. *Glover* (119 U. S., 543) the court, by Mr. Justice Field, speaking of this State control, said:

> The State is interested in the domestic as well as in the interstate and foreign commerce conducted on the Illinois River, and to increase its facilities, and thus augment its growth, it has full power. It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce that that body may interfere and control or supersede it. If, in the opinion of the State, greater benefit would result to her commerce by the improvements made than by leaving the river in its natural state—and on that point the State must necessarily determine for itself—it may authorize them, although increased inconvenience and expense may thereby result to the business of individuals. The private inconvenience must yield to the public good. The opening of a new highway or the improvement of an old one, the building of a railroad, and many other works in which the public is interested may materially diminish business in certain quarters and increase it in others; yet for the loss resulting the sufferers have no legal ground of complaint. How the highways of a State, whether on land or by water, shall be best improved for the public good is a matter for State determination, subject always to the right of Congress to interpose in the cases mentioned.

See *Withers* v. *Buckley* (20 How., 84); *McCready* v. *Virginia* (94 U. S., 391).

II.

These cases, and many others which might be cited from the reports of the United States and the State courts, express the principles of the common law upon this matter of control over navigable waters as applied to the States. In *Gann* v. *The Free Fishers of Whitstable* (11 H. L. Cas., 192) Lord Chancellor Westbury, in delivering an opinion, said:

> The bed of all navigable rivers where the tide flows and reflows and of all estuaries or arms of the sea is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject and can not be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he can not in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right. * * *
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> Speaking with great respect to the learned judges in the court below, it appears to me that the error of the judgments consist in not adhering to the clear principle that the grant by the Crown of any part of the bed or soil of this estuary below low-water mark, whether for a fishery or not, must by the common law have been subject to the public right of navigation, of which the right to anchor is an essential part; that no property can be claimed in the soil except subject to this overriding right.

This principle is recognized in the ordinance of 1787 and is carried into the constitution of Michigan. In that constitution are these provisions:

> Art. XVII, sec. 4. No navigable stream in this State shall be either bridged or dammed without authority from the board of supervisors of the proper county under the provisions of law. No such law shall prejudice the rights of individuals to the free navigation of such streams or preclude the State from the further improvement of the navigation of such stream.
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> Art. XIV, sec. 9. The State shall not be a party to, or interested in, any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the State of land or other property.

And Judge Cooley, in *Benjamin* v. *Manistee Imp. Co.* (42 Mich., 633), uses this language:

> It can not be seriously contended that the ordinance of 1787 was that the navigable rivers of the Northwest Territory should remain forever unimproved in order that they might be freely navigated in their natural condition and not otherwise. As the compact was made for the perpetual advantage of the people we must suppose that there was no purpose to limit this advantage to a minimum or to preclude either the territorial legislature or the new States which should come into the Union from increasing the benefits of the compact by improving the highways the ordinance secured, so as to make them accomplish their purposes as avenues of trade and commerce for all time. In other words, the navigable waters of the territory were placed upon the same footing with the navigable waters of the United States, the use of which is forever free, but

> nevertheless which are subject to State control and regulation, and may be improved by the States, and bridged or dammed under their legislation whenever the convenience of trade, traffic, and travel in all its infinite forms shall seem to require it. (Citing the Federal decisions.)
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> The States may, therefore, improve the natural highways by water, and they may improve the intersecting highways even though the result may be that the use of the highways by water is thereby to some extent impeded. Free navigation, therefore, does not necessarily mean navigation of the streams in their natural condition unobstructed and unimproved.

At the time of the admission of Michigan as a State the United States was the owner of all the land in the locality in question. It had made no grant of the upland, and it had not attempted to grant any of the submerged soil. The State of Michigan was therefore the owner of all the soil of this navigable stream. Whatever riparian rights there were in any view belonged to the United States. (*Shively* v. *Bowlby*, 152 U. S., 1.; *Potomac St. Co.* v. *Upper Potomac St. Co.*, 109 U. S., 672.)

By the act of Congress of 1852 (*supra*) the United States granted to the State of Michigan the land through which this canal was built, and a large appropriation to defray the cost. Michigan built the canal, with piers extending into the water of the river opposite the land in dispute. This canal with its approaches was completed in 1855.

The confirmation of the claim of those from whom plaintiff derived title was made September 4, 1855. This was after the whole character of the work had been

determined by the United States and the State of Michigan. The expressed object was to improve the navigation of the St. Marys River, a navigable stream. There is no doubt that the State had this power.

Leaving out of discussion, for the present, the paramount power of the Federal Government to improve the navigation of this stream, there remains, that it temporarily relinquished to the State government its powers and rights in this regard, potential and incidental. By repeated acts (*ut supra*) Congress appropriated large sums of money for the "improvement" of this canal and these waters. It is true that the piers remained the same until after the passage of the act of August 14, 1876. That act appropriated $130,000 for "the repair, preservation, construction, and completion" of this canal, "to be expended under the direction of the Secretary of War." The extension of the pier was commenced in 1877. Immense sums of money were appropriated from time to time by Congress. The work, under the direction of the Secretary of War and the Corps of United States Engineers, proceeded until its completion in 1881. At or about this time of completion Michigan transferred the canal to the United States. Previously it had been under the control and ownership of the State. The United States engineers were merely constructors.

The patent to Peck and the heirs of Newcomb, under which plaintiff holds, recites the plat of survey made by Whelpley in 1854–55, which shows that the land extended "along the right bank of the Ste. Marie River." It was for so many acres. In all grants made by the

United States the quantity of the grant is fixed and designated. The lands of the United States were surveyed by fixed boundaries and artificial lines of measurement, and were sold by the acre. This practice has always been recognized in the States which were formed out of the ceded territory of the Northwest. The firm upland alone was surveyed and measured and conveyed to Fletcher and the heirs of Peck.

Whatever of his rights, then, have been invaded, plaintiff must claim, by virtue of his riparian ownership, under the law of Michigan. All riparian rights stand upon an equality when their exercise comes in conflict with the sovereign rights of the people of the State. They spring from the same source. They have their differences of characteristics and of enjoyment, but their extent and limitations are alike. They all have their definitions and their determination by law. They are subordinate to the rights of the public in the navigation and other use of the stream. They are capable of grant and surrender.

The grant of this private land claim No. 3 must be be construed with reference to the existing circumstances at the time of the confirmation of the title in 1855. The legislation by Congress and the State legislature fixes its extent. The United States and the State had laid hold upon this river for the purpose of improving the navigation. The power of both, in this regard, had been exerted when all of sovereignty and all of property were in one or the other. There was no conflict between them; they acted in unison. The authority of the State

to improve the waters in aid of domestic commerce and the authority of the Federal Government to improve the waters for commerce between the States and with foreign nations had been put in action. The object and design and nature of these improvements had been determined and great works completed before the interests of any individuals in this locality had been acquired.

The plaintiff does not claim any injury on account of the construction of the canal and pier across a part of the riparian front of private land claim No. 3 prior to that time. Upon what different reason can he base a claim for compensation for interference with his rights by the alteration and extension of the pier after the act of 1876? Congress continued after 1855 to appropriate money for the canal and the improvement of the river before the passage of that act. The work done in 1877–1881 was, by the very terms of the appropriation acts, for the repair, preservation, construction, and completion of this canal and the improvement of the river. It was a continuation of the original undertaking; a perfection of the great enterprise. The General Government defrayed the cost; its money flowed out in regular streams from year to year, after 1876, as it had done before. The State was in control of the canal until time of completion. It is immaterial, as far as the rights of this plaintiff are concerned, to inquire who erected this pier. The State of Michigan, by its legislature, had determined that to make this improvement was a proper exercise of its power. Congress had determined it was a proper exercise of its power. Manifestly, all riparian rights incident to the lands affected, which it is claimed have

been interfered with by these structures, had been either extinguished or surrendered prior to the confirmation of the title of plaintiff's predecessors.

III.

But, independent of these conclusions, we turn to the examination of the question as presented by the plaintiff here: "Whether Congress, under the exercise of its power to regulate commerce, can entirely cut off the access of a riparian proprietor from his land to the water and from the water to his land."

This involves the inquiry as to the extent of the power granted to Congress by the Constitution to regulate commerce. This power includes "all the powers which existed in the States before the adoption of the Constitution." Much that we have heretofore said, on the authority of the cases cited, is applicable in this connection. After the adoption of the Constitution the power existing in the States for the improvement of rivers within their borders was recognized as a concurrent power used in the absence of legislation by Congress. When exercised by Congress the power is paramount and illimitable. Said Chief Justice Marshall, in *Gibbons* v. *Ogden* (9 Wheat.):

> All America understands, and has uniformly understood, the word commerce to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their Government and must have been contemplated in forming it.

South Carolina v. *Georgia* (93 U. S., 4) was an original bill in equity brought by South Carolina for an injunction against the obstruction of the navigation of the Savannah River. Immediately above the city of Savannah the river is divided by Hutchinsons Island, and there is a natural channel on each side of the island, both uniting at the head. The obstruction is at the point of divergence of the two channels, and its purpose and probable effect are to improve the southern channel at the expense of the northern by increasing the flow of the water through the former, thus increasing its depth and waterway. Mr. Justice Strong, delivering the opinion of the court, said:

> That the power to regulate interstate commerce and commerce with foreign nations, conferred upon Congress by the Constitution, extends to the control of navigable rivers between States, rivers that are accessible from other States, at least to the extent of improving their navigability, has not been questioned during the argument, nor could it be with any show of reason. From an early period in the history of the Government it has been so understood and determined. Prior to the adoption of the Federal Constitution the States of South Carolina and Georgia together had complete dominion over the navigation of the Savannah River. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. They could have determined that all vessels passing up and down the stream should pursue a defined course, and that they should pass

along one channel rather than another, where there were two. They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions thereon at their will.

* * * * *

The action of the defendants is not, therefore, the destruction of the navigation of the river. True, it is obstructing the waterway of one of its channels and compelling navigation to use the other channel; but it is a means employed to render navigation of the river more convenient—a mode of improvement not uncommon. The two channels are not two rivers, and closing one for the improvement of the other is in no just or legal sense destroying or impeding the navigation. If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand bank, or a jetty pushed out into the stream to narrow the waterway and increase the depth of water and the direction and force of the current, or the pier of a bridge standing where vessels now pass and where they can pass only at very high water. The impediments to navigation caused by such structures are, it is true, in one sense obstructions to navigation, but so far as they tend to facilitate commerce it is not claimed they are unlawful. In what respect, except in degree, do they differ from the acts and constructions of which the plaintiff complains? All of them are obstructions to the natural flow of the river, yet all except the pier are improvements to its navigability, and consequently they add new facilities to the conduct of commerce. It is not, however, to be conceded that Congress has no power to order obstructions to be

> placed in the navigable waters of the United States, either to assist navigation or to change its direction by forcing it into one channel of a river rather than the other. It may build light-houses in the bed of the stream. It may construct jetties. It may require all navigators to pass along a prescribed channel, and may close any other channel to their passage.

In *County of Mobile* v. *Kimball* (*supra*), in the course of his opinion, Mr. Justice Field said:

> That power (the commercial power of Congress) is indeed without limitation. It authorizes Congress to prescribe the conditions upon which commerce in all its forms shall be conducted between our citizens and the citizens or subjects of other countries and between the citizens of the several States and to adopt measures to promote its growth and insure its safety. And as commerce embraces navigation, the improvement of harbors and bays along our coasts and of navigable rivers within the States connecting them falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character and admit and require uniformity of regulation, affecting alike all the States; others are local or are mere aids to commerce and can only be properly regulated by provisions adapted to their special circumstances and localities.

Wisconsin v. *Duluth* (96 U. S., 379) was also an original bill in equity in this court. The bill was brought to enjoin Duluth from continuing and carrying on a system of harbor improvements for which large and continuous

appropriations had been made by Congress. The bill was dismissed. The court, Mr. Justice Miller delivering the opinion, said:

> It is to be observed as preliminary to an examination of the acts of the General Government in the special matter before us that the whole system of river and lake and harbor improvements, whether on the seacoast or on the lakes or the great navigable rivers of the interior, has for years been mainly under the control of that Government, and that whenever it has taken charge of the matter its right to an exclusive control has not been denied. The operations of the Government in this regard have been conducted by the Bureau of Engineering, as part of the War Department, to which Congress has confided the execution of its wishes in all these matters. That Department has mapped out in suitable geographical divisions the works thus imposed upon it and placed these under the control of officers who are in charge of them. These are again subdivided, so that while the lake system, or, at all events, the Western lake system, is in charge of one general superintendent, the separate works which at different places are conducted under him have each another engineering officer, who has special charge of those works.
>
> For many years past Congress has been in the habit of passing an annual appropriation bill, called the river and harbor bill, devoted to works of this class exclusively, and in these bills it appropriates specific sums to specific works, either already commenced and unfinished or for new works thereby authorized, or sums necessary for the safety and protection of works already in existence. The money thus appropriated is expended, as we have said,

under the direction of the War Department. It can not be necessary to say that when a public work of this character has been inaugurated or adopted by Congress and its management placed under the control of its officers there exists no right in any other branch of the Government to forbid the work or to prescribe the manner in which it shall be conducted.

* * * * *

We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States and these acts of the Executive Department in carrying those statutes into effect constitute an adoption of the canal and harbor improvement started by the city of Duluth and a taking exclusive charge and control of it, that they amount to the declaration of the Federal Government that we here interpose and assert our power; we take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.

Nor can there be any doubt that such action is within the constitutional power of Congress. It is a power which has been exercised ever since the Government was organized under the Constitution. The only question ever raised has been, How far and under what circumstances the exercise of the power is exclusive of its exercise by the States? And while this court has maintained, in many cases, the right of the States to authorize structures in and over the navigable waters of the States, which may either impede or improve their navigation in the absence of any action of the General Government in the same matter, the doctrine has been laid down with unvarying uniformity that when Congress has, by any expression of its will, occupied the field, that action

> was conclusive of any right to the contrary asserted under State authority. The adjudged cases in this court on this point are numerous.

In *Miller* v. *The Mayor, etc., of New York* (109 U. S., 385), affirming and approving the same case in the circuit court (13 Blatch., 469), the court, by Mr. Justice Field, said:

> The erection of the bridge at the elevation proposed was authorized by the action of both the State and Federal governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent permitted by the only authorities which could act upon the subject; and the injury then apprehended and alleged by the plaintiff and now sustained is only such as is common to all persons engaged in commerce on the river and doing business on its banks, and, therefore, not the subject of judicial cognizance.

Chappell v. *Waterworth* (the Hawkins Point Light-House Case, 39 Fed. Rep., 77) was an action of ejectment brought in the circuit court of the United States for the district of Maryland to dispossess the United States of a light-house built by authority of Congress on submerged land on the bottom of Patapsco River, a navigable river of the United States. The plaintiff had acquired by grant from the State title to the upland and shore and the bed of the stream covered by the light-house, and had riparian rights conferred by the statutes of Maryland. The circuit judge, in delivering the opinion, said:

> While the submerged land remains a part of the bed of the river, it is not private property in the

sense of the fifth amendment to the Federal Constitution. As was declared in *Gilman* v. *Philadelphia* (3 Wall., 725): "The navigable waters are the public property of the nation, subject to all requisite legislation by Congress." In the hands of the State or the State's grantee the bed of a navigable river remains subject to an easement of navigation which the General Government can lawfully enforce, improve, and protect.

It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners gives them a claim for compensation. The contrary doctrine, that in order to develop the greatest public utility of a waterway private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the Supreme Court.

We have seen that in constructing this magnificent and expensive work the United States and the State of Michigan joined. This is not important as far as the power of Congress is concerned. Even if there had been conflict between the two jurisdictions, when the Federal Government, by its agents, took control of the canal with its structures and connections, or any of them, this was a declaration and an exercise of the plenary power by Congress. For Congress has the unconditional authority to determine when and where to exert this power, and if these submerged lands had belonged to the State, as they did when this work was commenced, the Federal Government could have taken them without consent and without compensation for these purposes. This condition did not arise here, for the canal and pier of 1852–1855 were built by the State with the proceeds

of the Congressional grant of 1852; and whatever occupation and regulation were had by the officers of the General Government, by reason of the appropriations made in 1870, 1871, 1874, and 1875 (*ut supra*), were had with the consent of the State. Manifestly this was in recognition of the supreme jurisdiction of Congress. While, therefore, there is no question between the two governments, these facts and these principles are material in determining what rights, if any, of the plaintiff have been interfered with.

These principles were discussed and ably stated by Mr. Justice Bradley, in *Stockton, Atty. Gen.*, v. *Baltimore and N. Y. R. Co.* (32 Fed. Rep., 9). That was an information filed by the attorney-general of New Jersey to enjoin the railroad company from erecting a bridge across "Arthur Kill," between New Jersey and Staten Island, upon lands of the State situated on the shore and under the waters of the "Kill." The railroad company claimed the right to build the bridge and to occupy the lands under water necessary for the support of its piers by virtue of an act of Congress approved June 16, 1886. The constitutionality of the act and the right of the railroad company to build the bridge were denied upon many grounds, all of which were overruled by Mr. Justice Bradley. In considering this supreme power to regulate commerce, that judge said:

> The information rightly states that prior to the Revolution the shore and land under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the Crown, and devolved to the State by right of conquest. The information

does not state, however, what is equally true, that after the conquest the said lands were held by the State, as they were by the King, *in trust* for the public uses of navigation and fishery and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they were held for the use of the people at large.

* * * * *

Such being the character of the State's ownership of the land under water—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the Constitution. The fifth amendment provides only that *private property* shall not be taken without compensation, making no reference to public property. But if the phrase may have an application broad enough to include all property and ownership, the question would still arise whether the appropriation of a few square feet of the river bottom to the foundation of a bridge, which is to be used for the transportation of an extensive commerce in aid and relief of that afforded by the waterway, is at all a diversion of the property from its original use. It is not so considered when sea walls, piers, wing dams, and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. Why should it be deemed such when (without injury to the navigation) erections are made for the purpose of aiding and enlarging commerce beyond the capacity of the navigable stream itself and of all the navigable waters of the country? It is commerce and

not navigation which is the great object of constitutional care.

The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States has or has not the theoretical ownership and dominion in the waters or the land under them; it has what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no State can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power "to regulate commerce." Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the States extends not only to the control of the navigable waters of the country and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient.

This case goes much farther than is necessary to support the contention of the Government in the present case, for it holds that the bed of a river, owned by the State, may be used by the United States without the consent of the State and without compensation, for the construction of a bridge over the river, and not in aid of

the navigation of the river, but in aid of interstate commerce generally. A further extension of this doctrine is found in cases like *Pennsylvania* v. *Wheeling Bridge* (18 How., 429), and "*The Clinton Bridge*" (10 Wall., 454), where the court had decided in the former case that Congress could interfere and legalize a bridge, a decree having been rendered declaring it an obstruction and directing it to be removed, by elevating the bridge, or if not, by abatement; and in the latter case, that Congress could legalize a bridge, pending a suit to remove the structure as a nuisance.

IV.

The contention of the plaintiff is narrowed to one point, and to prevent inexactness is stated in his own language:

> *It is not claimed here that compensation must be made for the appropriation of submerged lands, but that Congress has no power to cut off the plaintiff from his access to and from the navigable water in front of his land without compensation. We contend that the right of access of a riparian owner is a property right which can not be destroyed nor appropriated by Congress under the commerce clause of the Federal Constitution, except in accordance with the provisions of the fifth amendment.*

While we do not admit the fact assumed in this statement, we will proceed to the examination of the proposition, and especially in connection with the principles above asserted. For it is difficult to see how, where in a navigable nontidal river the ownership of the soil to the center of the stream is in the riparian owner, and an

obstruction is erected upon the submerged land of such owner, the right of access can be completely dissociated from that ownership.

It was long questioned in England whether an owner of land on the banks of a public navigable river has the same natural rights as one who has land abutting on a private stream and whether the fact of a river being tidal makes any difference. In *Lyon* v. *Fishmonger's Co.* (1 L. R., 1 App. Cas., 662) this question was settled and the distinction made that the rights existed in each case, but in the case of a public navigable river the rights of the riparian owner must be subject to the public right of navigation.

These *natural* rights are, generally, connected with the condition of the water in front of the bank of the riparian owner. They are: Right to the flow of the water without diminution, deterioration, or alienation of current; right to purity of the water, not contaminated by use of other riparian owners above; right to take water for use and consumption as it passes in the stream.

Now, the right of access is called a *natural* right in precisely the same way as these natural rights are spoken of. Indeed, there is a manifest connection and dependence on the part of the former. As Lord Selborne, in this leading case of *Lyon* v. *Fishmonger's Co.* (*supra*) said:

> The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure naturæ*, because his land has by nature the advantage of being washed by the stream; and if the facts of nature constitute the foundation of the right, I am unable to see why the law should not recognize and follow

> the course of nature in every part of the same stream. With respect to the ownership of the bed of the river, this can not be the foundation of riparian rights properly so called, because the word riparian is relative to the bank and not to the bed of the stream, and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but upon grant or presumption of law. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may lawfully be so appropriated by every one having a right of access to it.

These natural rights exist in relation to both nonnavigable and navigable streams. In the latter they have a limitation. The needs of society require limitations of all natural rights. The distinction is transparently made by the Lord Chancellor in his opinion in the above case:

> A riparian owner on a navigable river has, of course, superadded to his riparian rights the right of navigation over every part of the river; and, on the other hand, his riparian rights must be controlled in this respect, that whereas, in a nonnavigable river all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene and would prevent this being done.

In other words, these riparian rights in a navigable stream exist, but are subordinate to the public right of navigation. As Lord Selborne expressed it, the riparian proprietor has "a right to the river frontage belonging by nature to his land, although the only practical ad-

vantage of it might consist in the access thereby afforded him to the water, for the purpose of using, when upon the water, the right of navigation common to him with the rest of the public. Such a right of access is his only, and is his by virtue, and in respect of his riparian property; it is his wholly distinct from the public right of navigation."

What is this right of access as independent of the ownership of the submerged land? It is difficult to frame a definition which will embrace all cases. For this right, when asserted on the banks of a stream which has not tides nor shore, is dependent more or less upon surrounding circumstances. But it may safely be said that it is a right to reach from the bank of the owner's land that portion of the river which is or may be used for navigable purposes. It does not necessarily extend to all the water of all the river, nor to the deepest water in front of the land. It is an exclusive right; but the measure of its exclusiveness is to reach the navigable river from that frontage. The approach may be made by a step, by stairs, or wharves, or piers, or in any manner which will not interfere with the rights of other proprietors or the public right of navigation.

The right is not qualified by the riparian lines which govern the extent of ownership of the soil to the thread of the stream. It stands upon distinct reasons from that of such ownership or any of its boundaries.

If a riparian owner can without hindrance reach navigable water over which he can go to the deepest part of the river equally with other riparian owners in the same

plight, and with the public, he can have no redress against an obstruction which is between the deepest water and the water thus used. This is but an inconvenience common to him and others. He can go to and from the highway unimpeded. His right of access is not interfered with.

Rose v. *Groves* (5 M. & G., 613), quoted by the plaintiff here, illustrates what the manner of obstruction must be to entitle to compensation. There the defendant placed logs in the river, which floated down and lodged against the plaintiff's bank and prevented access to his inn. Plaintiff recovered damages for this obstruction. His guests could not come from the highway to his inn.

And so with all highways, whether on land or water. The obstruction must be to the "immediate access from private property to the public highway," to use the language of Lord Selborne.

In *Montreal* v. *Drummond* (1 App. Cas., 384) it was held that the closing of one end of a street was not an interference of the right of access as gave a claim for compensation. Sir Montague E. Smith, in delivering the opinion, said:

> The right of access to a house is of course essential to its enjoyment, and if, by reason of alterations in the street, the owner can not get into or out of it, or is obstructed in doing so, there seems to be no doubt that by the laws of France he is entitled to recover in some form indemnity for the damage he sustains. But the stopping of a street at one of its ends does not produce these consequences. * * * The only effect of making the street a *cul de sac*, so far as the rights of access and passage are con-

cerned (apart from the loss of customers to be presently mentioned), is that the plaintiff's tenants have to go by other streets and farther to reach the southern part of the city.

In *Blackwell* v. *Old Colony Railroad Co.* (122 Mass., 1), which was an action for direct injury to the navigation of the stream, the court, by Gray, C. J., said:

> The fact that the plaintiff alone now navigates the stream, or has a wharf thereon at which he carries on business, only shows that the present consequential damage may be greater in degree than to others, but does not show that the injury is different in kind or that other riparian proprietors and the rest of the public may not, whenever they use the stream, suffer in the same way. The case has no analogy to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land, or, being against the front of his land, entirely cuts off his access to the stream, and thereby causes a direct and peculiar injury to his estate.

V.

The plaintiff does not claim that he has been interfered with in the actual exercise of any right. His bank line is open and unobstructed. The water flows in pure and natural current by his land. No embankment or pier or vagrant log rests against his premises. He has built no platform and stairs for the reception of guests. He has projected into the water no wharf or pier to which vessels may come and unload their cargoes. He has no warehouses nor stores nor shops nor business which have been or are subjected to or threatened with loss and destruction. He asserts a naked right of access and that he has been

deprived of it. If this were an action of damages, what would be the measure of his damages? What could he recover?

In *Coburn* v. *Ames* (52 Cal., 385), some such condition was referred to, and the court, by Judge Champlin, who delivered the opinion, said (p. 398):

> Assuming, as we do, for the purposes of this decision, that the riparian proprietor is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised by him at his election. He may never see fit to avail himself of the privilege, and it can not be pretended that while declining to avail himself of his right to wharf out, he is, nevertheless, entitled to the possession of the land below high-water mark, on the theory that at some future time he may possibly change his mind and desire to erect a wharf. On this theory he might capriciously refuse to erect a wharf at a point where the convenience of commerce demands it, and might prevent others indefinitely from engaging in the enterprise. A theory which works this result ought not and can not be upheld. On the contrary, giving to this right of the riparian owner its widest scope and latitude, it amounts only to this, that if he desires to wharf out and is unlawfully obstructed in the right he may maintain an action for damages; and if the obstruction amounts to a public nuisance he may possibly cause it to be abated by the appropriate method.

But, as a fact, this plaintiff has been deprived of no property right of access whatever. He can go to and from the water exactly as he could before the erection of this pier. He can use the right of navigation, when upon

the water, common to him with the rest of the public. He can go to the deepest water with entire freedom, although the way is a little longer. Any vessel or craft, of whatever size or description, which could come to his land before can come now. He has full right to build wharves and piers for his profit and advantage in front of his land, provided they do not interfere with the public right of navigation; and this is all he ever could do. It is to be remarked, too, that these lands are above the rapids of the St. Marys River; and that, before the digging of this canal and the building of the original piers, there were scant trade and traffic on those waters and none which could not be carried on in vessels small enough to navigate the present unobstructed water between the piers and the front of plaintiff's land. If he suffered any damage it was remote, consequential, inappreciable, and of the same kind as the rest of the public would suffer if they used the water. The canal and piers created the navigation and the commerce as they now are. What were then idle waters of lake and river now carry in a single year 21,000,000 tons of freight in 17,000 bottoms. What more imposing illustration of the power to regulate commerce could be given. What more convincing proof that these works were in aid of navigation.

In all the cases in Michigan the doctrine is stated that the ownership of the soil to the middle of the stream is subject to the right of navigation. In *Ryan* v. *Brown* (*supra*), where the extreme position is taken, the court say that the control of the use of such land by the riparian owner is limited and qualified by such rights as belong to the public at large to the navigation, and such

other use, if any, as appertains to the public over the water, and the State authorities are cited. In *Benjamin* v. *Manistee Improvement Co.* (42 Mich., 633), Judge Cooley, speaking for the court, says that the States may improve the natural highways by water, though the result may be that their use is thereby somewhat impeded. It is a rule of this property, universal and undisputed.

If the State, being owner of the submerged land in navigable streams, makes a grant of the same to an individual, he takes subject to this right of navigation, which includes the right of improvement. If the State has relinquished her right of ownership to all riparian owners, they hold subject to this same trust and servitude. The owner by operation of law has no stronger title than the owner by direct grant.

The constitutional power granted to Congress to regulate commerce authorizes the taking of the beds of streams and the waters over them to improve navigation. The necessity for and manner of exercising this power are within the sole province of Congress. This power can not and will not be exercised in conflict with any other provision of the Constitution. It is undisputed that private property can not be taken for public uses without just compensation. This is true as well of the State of Michigan as of the United States. And yet, when the soil and waters of a navigable stream, in their natural state, unincumbered and unused by the riparian proprietor, are taken possession of by Congress for the purposes of aids to navigation, and structures erected which do not touch the banks of the land of such proprietor nor prevent his free approach to the water, although he may

own *ad filum aquæ* and the erections are within that line, he has no ground for compensation, because no private property of his has been taken. If he had exercised the right to make improvements, and they had been taken, there would arise a different question.

This is a distinction which the plaintiff completely ignores; but it is the distinction of the cases—as well those cited by plaintiff's counsel as others. *Yates* v. *Milwaukee*, where a wharf had been built upon land covered by water of no use for navigation, to navigable water, decided that "the mere declaration of a city council that the wharf built and owned by plaintiff was a nuisance did not make it such, or subject it to be removed by authority of the city. It was recognized in the opinion that by the law of Wisconsin, established by the decisions of its supreme court, the title of the owner of land bounded by a navigable river extended to the center of the stream, subject, of course, to the public right of navigation." (*Shively* v. *Bowlby*, 152 U. S., 1, 40.)

Monongahela Navigation Co. v. *United States* only decided that where vested property, corporeal and a franchise to take tolls for the use of that property, are taken or destroyed by the Federal Government, the owner is entitled to just compensation.

These were equally property rights. If the locks and dams had not been built prior to the occupation under authority of Congress, there would have been no right for compensation for the franchise.

Dutton v. *Strong* decided that a riparian owner might, subject to all the limitations of submission to State regulations and to paramount power, build a wharf out to the

point of navigability. The whole doctrine of the property rights of riparian owners is elaborately and exhaustively treated of in the case of *Shively* v. *Bowlby* (*supra*).

Delaplaine v. *Chicago & N. W. Ry. Co.* and *Brisbane* v. *St. Paul, etc., Ry. Co.*, cited by plaintiff, decided that the owner's immediate contact with the water could not be interfered with by the corporations; and these were cases where the rights of owners were in conflict with the acts of private persons or corporations. Such, also, are the Wisconsin, Canada, and New York cases cited in plaintiff's brief. In *Ramsey* v. *N. Y. & N. E. R.* (133 N. Y.) the court, in deciding that the owner of land on a public river can recover damages from a railroad company for building an embankment across his water front and depriving him of access to the navigable part of the stream, declared that the principle could not "of course be extended so as to interfere with the right of the State to improve the navigation of the river or with the power of Congress to regulate commerce under the provisions of the Federal Constitution." The New York cases are reviewed in the late case of *Sage* v. *The Mayor, etc.* (154 N. Y., 61), and the principle laid down that the right of access may be entirely destroyed without compensation to the owner when this is done for the improvement of navigation and commerce. And in New Jersey it has been decided that the State can cut off the access of an abutting owner at will. (*Stevens* v. *Paterson, etc., R. R. Co.*, 5 Vroom, 532; *Mayer, etc., Hoboken* v. *Pa. R. R. Co.*, 124 U. S., 656.)

It is admitted, however, that plaintiff can not recover for the occupation of the submerged land. He has the

right of ownership and the right of access by virtue of his ownership of the abutting land. His right of access is completely enjoyed within the lines of his ownership to the center of the stream. How, then, can it be a higher or more sacred right? The proposition that it is a part of the upland avails nothing. A part can not be greater than the whole. And the submerged soil is equal in its estate to the upland, with these limitations, which are common to these *appurtenant* rights—the subordination to the public right of navigation and the paramount power in Congress.

There can be no question in cases like the one at bar as to the extent of the necessity for the impairment or destruction of riparian rights in the exercise of the power to regulate commerce. That is not a matter of judicial cognizance. The determination rests entirely with Congress. So, when it is intimated that the pier erected by the Federal Government might be used within certain arbitrarily marked lines as a portage, under private right, to carry goods and merchandise, or as a private wharf for loading and unloading cargoes, the power to regulate is taken from Congress and transferred to the individual. To state this proposition is enough. The manner of using the pier is a regulation of commerce.

These views are sustained by the latest deliverances of the Federal courts. *Gibson* v. *United States* (166 U. S., 269) was a case where the claimant had a farm in a high state of cultivation, with a dock or landing place used by her in shipping products to market. Under proper authority the Government built a dike for the improve-

ment of the navigation of the Ohio River, which substantially destroyed the claimant's access to the river and greatly injured her business. There was no physical contact with claimant's land. The court held there could be no recovery for taking of private property. Mr. Chief Justice Fuller, after tersely stating the principles governing encroachments upon riparian rights, in delivering the opinion of the court, said:

> Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government to which riparian property was subject, and not of a right to appropriate private property not burdened with such servitude to public purposes.
>
> In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property has always been subject.

And this is the law of property, determined, in harmony with all previous decisions, by the supreme court of Michigan, in this case limiting the rights of riparian owners. Without going into the history of the proceedings, this case had been taken by regular steps to the circuit court of appeals. The decision and reasoning of that court, in affirming judgment for the defendant, were adopted by the supreme court of Michigan. The learned

judge who delivered the opinion, in the circuit court of appeals, said in part:

> It must, from these constitutional principles, follow that the State of Michigan held the soil beneath her navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of Congress to regulate commerce among the States. The legal title which, under the law, becomes vested in such proprietors must be subject to the same public trusts, and therefore subordinate to the rights of navigation and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of the navigation and commerce should demand it. The right of Congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the State or is in the owner of the shore. A distinction must be recognized between that which is *jus privatum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public rights of navigation and the control of Congress over that right. This much seems expressly ruled in *Illinois Central Railroad Company* v. *Illinois*. Such submerged lands can only be disposed of by the State when that can be done without injury to the interest of the public in the waters, and subject to the paramount right of Congress to control their navigation so far as necessary for the regulation of commerce with foreign nations and between the States. (146 U. S., 387; 13 Sup. Ct. Rep., 110.) The right of access to deep water, which was considered in *Attee* v. *Packet*

Co. (21 Wall., 389), and *Yates* v. *Milwaukee* (10 Wall., 497), and *Gilman* v. *Philadelphia* (3 Wall., 724), is likewise a right subordinate to the power of the State and the Federal Government to control the stream in so far as necessary for the purpose of commerce. * * *

What is a proper exercise of this power of Congress to aid navigation seems to be for Congress to determine. The case of *South Carolina* v. *Georgia* (93 U. S., 4) is an illustration of the great discretion reposed in Congress as to the selection of means proper to the improvement or promotion of such public highway. In that case it was decided that Congress has the power to close one of several channels in a navigable stream, if, in its judgment, the navigation of the river will thereby be improved. The case did not turn upon the fact that the bill in the case was filed by the State of South Carolina, but was upon a construction of the power of Congress to determine the means by which the navigation of a river may be improved. See also the case of *Pennsylvania* v. *Wheeling Bridge Company* (18 How., 421) and *Wisconsin* v. *Duluth* (96 U. S., 379).

If the title had remained in the State, the conclusion would be the same. The State would hold subject to the public use, and its property right in the submerged soil of a navigable stream would be subservient to the power of Congress to regulate navigation, and the use of such soil as a support for a structure in aid of navigation would not have been the taking of the private property of the State, within the meaning of the constitutional provision inhibiting it without compensation. (*Scranton* v. *Wheeler*, 16 U. S. App., 152, 194.)

The following propositions are submitted by the defendant in error:

I.

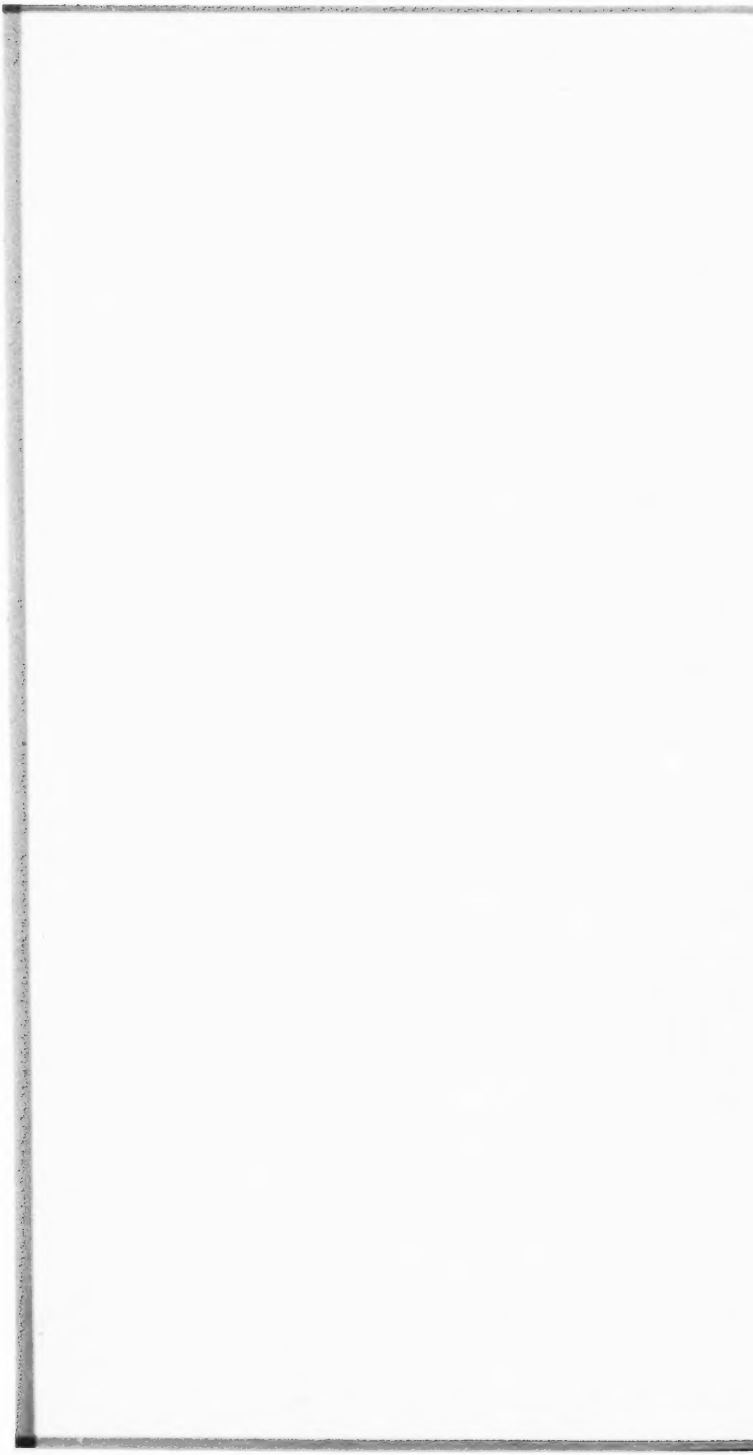
Ejectment is not the proper remedy for a riparian owner to secure removal of a structure which interferes with his access to navigable water. (*Coburn* v. *Ames*, 52 Cal., 385; *Parker* v. *West Coast Packing Co.*, 17 Oreg., 510; *Austin* v. *R. R. Co.*, 45 Vt., 244.)

II.

The building of the canal and pier at Sault Ste. Marie was within the authority of the State of Michigan in the aid of navigation and commerce; and the subsequent enlargement and continuation of the piers, effected by the State and by Congress, were within their plenary power and constituted no infringement of the rights of this riparian owner for which he is entitled to compensation.

ROBERT HOWARD,
Special Assistant Attorney.

JOHN K. RICHARDS,
Solicitor-General.



Supreme Court of the United States.

No. 9.—October Term, 1900.

Gilmore G. Scranton, Plaintiff in Error, vs. Eben S. Wheeler. } In error to the Supreme Court of the State of Michigan.

[November 12th 1900.]

This writ of error brings up for review a final judgment of the Supreme Court of Michigan holding that the United States is not required to compensate an owner of land fronting on a public navigable river when his right of access from the shore to the navigable part of such river is permanently obstructed by a pier erected in the river under the authority of Congress for the purpose only of improving navigation.

Omitting any reference to immaterial matters, the case as made by the pleadings and evidence is as follows:

By an act of Congress approved September 26th 1850, *c.* 71, providing for the examination and settlement of claims for land at the Sault Ste. Marie in Michigan, the local register and receiver of the land office were authorized to report upon claims to lots at that place under instructions to be given by the Commissioner of the General Land Office. 9 *Stat.* 469.

In conformity with proceedings under that act the heirs of Franklin Newcomb and Samuel Peck were confirmed in their claim jointly to premises known as Private Land Claim No. 3, and a patent was issued to them by the United States on the 6th day of October 1874. The premises were at the west or upper end of the St. Mary's Falls Ship Canal, and one of the boundaries, as shown by the field notes, was "along the right bank of the Ste. Marie River." By mesne conveyances from the heirs of Franklin Newcomb the plaintiff, Scranton, became the owner of an undivided half of the land in question.

By an act approved August 26th 1852, *c.* 92, Congress granted to the State of Michigan the right to locate a canal through the public lands in that State known as the military reservation at the Falls of St. Mary's River, and four hundred feet of land in width extending along the line of the canal was granted for the construction and convenience of the canal and the appurtenances thereto, the use being vested in the State for such purposes and no other. The act provided that the canal should be located on the line of the survey made for that purpose or on such other route between the waters above and below the Falls as might be selected with the approval of the Secretary of War. In aid of the construction

and completion of the canal Congress also granted to the State seven hundred and fifty thousand acres of public lands, and it was provided that the canal should be and remain a public highway for the use of the United States, free from toll or other charge upon the vessels of the Government engaged in the public service or upon vessels employed in the transportation of property or troops of the United States. 10 *Stat.* 35.

The construction of the canal was begun by Michigan in 1853 and completed in 1855. It was owned and operated by the State until the year 1881, when it was transferred to the United States in conformity with the River and Harbor Act of June 14th 1880, c. 211, by which $250,000 was appropriated for improving and operating the river and the canal, and by which also the Secretary of War was authorized to accept on behalf of the United States from the State of Michigan the St. Mary's Canal and the public works thereon—the transfer to be so made as to leave the United States free from all debts, claims or liability of any character whatsoever, and the canal after the transfer to be free for public use. By the same act the Secretary of War was authorized, such transfer being made, to draw from time to time his warrant on the Treasury to pay the actual expenses of operating and keeping the canal in repair. 21 *Stat.* 180, 189.

Prior to the transfer Congress had made large appropriations for the repair, preservation, improvement and completion of the canal. 16 *Stat.* 224, c. 240; *Id.* 402, c. 34; 18 *Stat.* 238, c. 457; *Id.* 456, c. 134; 19 *Stat.* 136, c. 267; 20 *Stat.* 156, c. 264; *Id.* 369, c. 181; 21 *Stat.* 189, c. 211.

As originally constructed, a pier extended from the west end of the canal into the water, curving to the north. This pier was opposite to a part of Private Land Claim No. 3, but left at that time a riparian frontage for those premises of from three to four hundred feet.

In 1877 the United States commenced and in 1881 completed the construction in the water of what is known as the New South Pier, which extended across the entire front of Private Land Claim No. 3 and was within the riparian ownership of the plaintiff as projected from the land towards the middle thread of the stream. The effect of the construction of this new pier was to exclude the plaintiff altogether from access from his land within the lateral lines of his riparian ownership, projected as aforesaid, to the navigable water or to the channel of the river that was navigable. On both sides of the space included within such projected lines of the plaintiff's riparian ownership and between the new pier and the bank of the river, the water was only five feet in depth; so that by reason of the construction and maintenance of the pier the plaintiff was prevented from reaching navigable water of greater depth than five feet.

The plaintiff desired to land freight on the New South Pier, and thus convey it to the lot in question. But he was prevented from doing so by the defendant Wheeler, superintendent of the property, who was in

possession of and exercised exclusive control over the canal and the pier as an officer or agent of the United States, and not otherwise.

No part of the pier in question in front of Private Land Claim No. 3 rests upon the fast land within that claim, but entirely upon submerged lands in front of or opposite to the fast land. The water between the pier and dry land is very shoal.

St. Mary's River forms a part of the boundary line between the United States and Canada, and where navigable forms, with the Great Lakes, a highway for interstate and international commerce. Near the point in question the river was not originally navigable owing to the falls, and the canal was built around the falls to connect its navigable parts above and below, and was used in connection therewith for the purposes of such commerce.

The present action was brought by Scranton against Wheeler in the Circuit Court of Chippewa County, Michigan, the declaration alleging that the plaintiff was the owner in fee but was illegally deprived by the defendant of the possession of his interest in "Private Land Claim No. 3, Whelpley's survey, in the village of Sault Ste. Marie, Michigan, including therein that portion of the land beneath the water of St. Mary's River from the river bank on said lot to the thread of the stream of said river, which forms a part of said lot, and all riparian rights belonging and attaching thereto and being a part thereof;" which premises the plaintiff claimed in fee. The damages alleged were $35,000.

Upon the petition of Wheeler, the action was removed for trial into the Circuit Court of the United States on the ground that the Government of the United States was the real party in interest, and that the defense depended upon the construction of the laws of the United States. In that court there was a judgment in his favor. The case was then carried to the Circuit Court of Appeals, where the judgment was affirmed, an elaborate opinion being delivered by Judge Lurton. 16 *U. S. App.* 152; 57 *Fed. Rep.* 803. That court held: That an officer of the United States could be sued in ejectment by one claiming the title and the right of possession; that the case was properly removed to the Circuit Court for trial; that the Circuit Court of Appeals had jurisdiction under the act of March 3d 1891, c. 517, 26 *Stat.* 826, to review the judgment of the Circuit Court; and that as "an incident to ownership of lands on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged lands under the stream comprehended within parallel lines extending perpendicular to the general trend of the shore along his land to the center of the stream." After observing that although the plaintiff under the law of Michigan was seized of the legal title to the soil under the water, yet, in the very nature of the property, such seizure was of the bare technical title, the court proceeded: "It must, from these constitutional principles, follow that the State of

Michigan held the soil beneath her navigable rivers under a high public trust, to forever preserve them free as public highways, subject only to the power of Congress to regulate commerce among the States. The legal title which, under her law, becomes vested in such proprietors, must be subject to the same public trusts, and therefore subordinate to the rights of navigation, and subordinate to the power of Congress to control and use the soil under such streams whenever the necessities of navigation and commerce should demand it. The right of Congress to regulate commerce, and, as an incident, navigation, remains unaffected by the question as to whether the title to the soil submerged is in the State or is in the owner of the shores. A distinction must be recognized between that which is *jus privitum* and that which is *jus publicum*. This private right is subordinate to the public right. The plaintiff holds the naked legal title, and with it he takes such proprietary rights as are consistent with the public right of navigation, and the control of Congress over that right. . . The significance of that case [*Willson* v. *Marsh Co.*, 2 *Pet.* 245], as it affects this, was the refusal to enjoin the erection of the bridge on the complaint of one owning land on the shores above, whose access to and use of the stream was thereby injured. His property had not been taken. The injury to him was consequential, and he was held to be without remedy. Here the plaintiff has sustained an injury which is wholly the consequence of the erection of a structure by Congress in aid of the general and public right of navigation. If Congress may lawfully use the soil as a support for such structures without acquiring the naked title outstanding in the plaintiff, then, for such injuries as are merely consequential, it is a case of damage without an actionable injury. A distinction exists between those cases where, under authority of the State, a structure has been placed in a navigable stream, such as a bridge, or lock and dam, as an improvement to the navigation of a stream wholly within its borders, and which is sought to be removed under the authority of subsequent Congressional legislation. In such case, the improvement, being by authority of law, can only be taken for public uses upon just compensation. This is the doctrine of the case of *Monongahela Navigation Co.* v. *United States*, 148 *U. S.* 312. In that case it was held that not only must the actual property of the owner in the structure, but his franchise also, must be paid for. The plaintiff in the case before us has made no improvements for either public or private uses. No property of his has been invaded, none has been taken. The title in him was subject to the public uses. He held the soil under the river subservient to the purposes of navigation. The right to regulate commerce involved the right to regulate navigation, and this, in turn, involves the necessary uses of the submerged lands, in so far as such use was essential to the maintenance of the public highway. . . The conclusion that we have reached is that there is no error in the judgment

of the Circuit Court. The plaintiff has no such ownership of the *locus in quo* as makes its use for the purposes to which it has been devoted a taking of private property within the meaning of the Constitution."

Upon writ of error to this court the judgment of the Circuit Court of Appeals was reversed, upon the joint motion of the parties, with directions to remand the case to the State court for trial. The parties concurred in the opinion that the case was not removable from the State court—*Tennessee* v. *Union and Planters' Bank*, 152 *U. S.* 454, and *Chappel* v. *Waterworth*, 155 *U. S.* 102, being cited by them in support of that view.

At the trial in the State court the plaintiff asked the court to charge the jury—

That under the law of Michigan applicable to the facts in this case, the plaintiff was the owner of the submerged land in front of his upland, bounded by lines extending from the lateral lines of the upland to the center file of the stream, and running at right angles with the course of the stream in front of the upland, and therefore that the land and property described in the declaration belonged to and was owned by the plaintiff in fee simple, and so belonged to him when the action was brought;

That the pier or structure in question was constructed and was maintained by the defendant across plaintiff's land without his consent and against his rights in the premises;

That neither the defendant nor the United States had any lawful right to construct the pier on and across the premises in question, thus taking possession of the premises adversely to the plaintiff and excluding him from enjoyment thereof, and from all access from his land and premises to the navigable water of the river in front thereof, and from the navigable water of the river to his land;

That neither the Government of the United States nor the defendant had any lawful right to so construct the pier or to maintain the same as was being done at the time suit was brought, and as they were now doing, without their first having acquired the right to so construct and maintain the same from the owner of the fee, or without obtaining the right therefor by proceedings under the power of eminent domain on payment of due compensation to the owner of the land therefor; and,

That under Article V of the Amendments to the Constitution of the United States the property in question could not lawfully be taken for the public use to which it was appropriated without just compensation having been made therefor to the owner or without due process of law.

The plaintiff also requested this instruction: "The construction of this pier was in violation, and the maintaining of the same was in violation of, said Article V of the Amendments to the Constitution of the United States in this, that it appears from the testimony in the case that the same was appropriated without due process of law, and the same was taken and